

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

2016 NOV 28 PM 3: 21

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

CLERK

BY LTW  
DEPUTY CLERK

KIRK WOOL,

Plaintiff,

v.

LISA MENARD, Commissioner of Vermont  
Department of Corrections

Defendant.

Case No. 2:16-cv-120

**OPINION AND ORDER**  
**ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION**  
**TO DISMISS PLAINTIFF'S COMPLAINT WITHOUT PREJUDICE**  
**AND GRANTING LEAVE TO AMEND**  
(Docs. 64 & 98)

On May 9, 2016, Plaintiff Kirk Wool, a self-represented inmate, filed a notice to remove his "1st Amendment retaliation claim" and other claims against Defendant Lisa Menard, Commissioner of the Vermont Department of Corrections ("DOC") to this court (the "Notice"). (Doc. 64 at 1.) The Notice pertains to a complaint Plaintiff filed in Vermont Superior Court challenging Defendant's alleged false designation of him as a "high risk" offender. (Doc. 6 at 1) (internal quotation marks omitted). Since that time, Plaintiff has expressed a desire to proceed both in state court and in this court.

This matter came before the court for a review of the Magistrate Judge's September 19, 2016 Report and Recommendation ("R & R") (Doc. 98), in which he recommended that the court treat Plaintiff's Notice as a motion to dismiss his federal claims against Defendant pursuant to Fed. R. Civ. P. 41(a)(2). The Magistrate Judge

further recommended that the court grant the motion, dismiss Plaintiff's initial Complaint, and permit Plaintiff to amend his Complaint to clarify which claims he seeks to pursue in this court. This will assist the parties in litigating Plaintiff's claims and will assist the court in adjudicating them. At present, the record is too conflicted to determine Plaintiff's intent and there do not appear to be any federal claims pending before the court. Neither party has filed an objection to the R & R, and the time period to do so has expired.

A district judge must make a *de novo* determination of those portions of a magistrate judge's report and recommendation to which an objection is made. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1); *Cullen v. United States*, 194 F.3d 401, 405 (2d Cir. 1999). The district judge may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *accord Cullen*, 194 F.3d at 405. A district judge, however, is not required to review the factual or legal conclusions of the magistrate judge as to those portions of a report and recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985).

### CONCLUSION


The court hereby ADOPTS the Magistrate Judge's recommendation and DISMISSES WITHOUT PREJUDICE Plaintiff's initial Complaint (Doc. 6) and GRANTS Plaintiff thirty (30) days from the date of this Order to file an Amended Complaint. Any amended filing shall be entitled "Amended Complaint" and shall consist of numbered paragraphs containing short and plain factual allegations, a short and plain statement of each legal claim Plaintiff asserts, and a clear and concise statement of the relief requested. *See* Fed. R. Civ. P. 8(a) (listing required contents of a pleading that states a claim for relief).

In the Amended Complaint, Plaintiff must allege all claims and name all defendants that Plaintiff intends to include, as the Amended Complaint will take the place

of the original Complaint in all respects. Failure to file an Amended Complaint in the time period provided shall result in the dismissal of this action with prejudice.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 28<sup>th</sup> day of November, 2016.

  
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Christina Reiss, Chief Judge  
United States District Court